UNITED STATES FIDELITY AND GUARANTY COMPANY *v.* UNITED STATES FOR THE BENEFIT OF BARTLETT.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 50. Argued November 6, 7, 1913.—Decided December 1, 1913.

A bond given pursuant to the act of August 13, 1894, c. 280, 28 Stat. 278, for a contract for building a stone breakwater, under the terms of this contract, covers claims for labor on work at the quarry and for hauling and delivering the stone.

Under the circumstances of this case *held* that the claims of laborers for wages had been properly assigned to the claimant and clothed him with legal right to maintain an action upon the bond given under the act of August 13, 1894.

A claim against the surety on the bond of a government contractor will not be rejected as fraudulently excessive where it is shown that claimant's books have been destroyed but he offers to allow credits properly shown on the contractor's books and the records do not

rence. *Equitable Savings Assn.* v. *Hewitt*, 55 Oregon, 329, 338.

Where the items for which a lien can be claimed are inextricably blended and intermingled with items for which no right of lien can be urged, the action cannot be maintained. *United States* v. *Conkling*, 135 Fed. Rep. 508, 512; *Schulenburg* v. *Strimple*, 33 Mo. App. 154.

The creditor was guilty of such gross laches and delay in presenting his claim against the surety that his action, followed as it was by the withdrawal of retained percentages and the insolvency of the principal, bars recovery. *United States F. & G. Co.* v. *United States*, 191 U. S. 416, 426; *United States* v. *American Bonding Co.*, 89 Fed. Rep. 921.

The admissions and declarations of Hughes Brothers & Bangs, who were subcontractors of the principal in the bond, were inadmissible and incompetent as against the surety. 1 Greenleaf Evidence, § 187 (16th ed., note 1); *Hatch* v. *Elkins*, 65 N. Y. 489, 496; *Rae* v. *Beach*, 76 N. Y. 164, 168; *Wheeler* v. *State*, 56 Tennessee, 393; *White* v. *Bank*, 56 Tennessee, 475; *Bocard* v. *State*, 79 Indiana, 270; *Knott* v. *Peterson*, 125 Iowa, 404, 407; *Lee* v. *Brown*, 21 Kansas, 458; *Howe* v. *Farrington*, 16 Hun (N. Y.), 591; *Ayer* v. *Getty*, 46 Hun (N. Y.), 287, 288.

Mr. Edward W. Norris and *Mr. Horace L. Cheyney*, with whom *Mr. Henry B. Hammond* was on the brief, for defendant in error.

After making the foregoing statement, MR. JUSTICE DAY delivered the memorandum opinion of the court.

The nature of liability upon bonds given in pursuance of the act of Congress has been the subject of frequent consideration in this court, and the former discussions and conclusions need not be repeated here. *Guaranty Co.* v.

Pressed Brick Co., 191 U. S. 416, 427; *Hill* v. *American Surety Co.*, 200 U. S. 197; *Mankin* v. *Ludowici-Celadon Co.*, 215 U. S. 533.

The first contention of the plaintiff in error is that the work done at the quarry and the hauling and delivering of stone at the breakwater, or, at least, certain parts of such work, are not within the terms of the contract and bond, as work done or material furnished in the prosecution of the work provided for in the contract. This contention was rejected by the court below and we think properly. The object of the contract was to put the stone in place, much of it being merely dropped into the water, with a view to the construction of the breakwater. To accomplish this purpose it was of course necessary to have the material taken from the quarry, using tools and labor for that purpose, and transported to the location of the breakwater and there deposited. This material could not be had immediately at the breakwater, and bids were required to show samples of stone and names and locations of quarries to be used as the source of supply. The work involved in the claim here made was all necessary to the performance of the contract, and in our view comes clearly within the class of labor accounts the satisfaction of which it was the purpose of the act of Congress to secure by a proper bond.

It is next contended that the laborers had not assigned their claims to Bartlett in such way as to give him any more than an equitable right thereto and had not clothed him with the legal right to maintain an action at law upon the bond. But we think that the testimony discloses that so much of the laborers' wages as were necessary to satisfy Bartlett's advances were assigned to him with their consent and deductions to that extent made from such wages with their approval in such wise as to consummate the assignment.

It is next urged that in making the claim for an excessive

amount there was such gross fraud that no recovery can be had in the case. It is sought to bring this contention within that class of cases which have held that mechanics' liens when willfully and intentionally made for an amount in excess of that fairly due cannot be enforced for any sum. We do not think the record displays a case of that character. It appears that some of the books of Bartlett left in a building at the quarry had been destroyed and that efforts were made to obtain the amount of payments from other sources. At the trial it appeared that the credits to be made upon the account were contained upon certain cards which were in the possession of counsel for the plaintiff in error. Upon production at the trial they were admitted and accepted as containing proper credits to be made upon the account, and the judge charged the jury that the credits shown on the cards should be made the basis of calculations by the jury, if they found under the facts shown that any statement of the account was required, and the verdict was rendered accordingly.

As to the contention that the suit of defendant in error, in view of the delay in bringing it and want of previous demand or notice to the surety, shows gross laches, we agree with the Circuit Court of Appeals that the record does not disclose any such laches or change of relation affecting the rights of the surety as would relieve it of liability. Nor do we think there was such confusion of accounts or error in the admission of testimony as to require a reversal.

It therefore follows that the judgment of the Circuit Court of Appeals, affirming the judgment of the Circuit Court, must be

Affirmed.